IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11631 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUNITA DYEING MILLS PVT LTD

Versus

UNION OF INDIA THRO' SECRETARY

Appearance:

1. Special Civil Application No. 11631 of 2003

MR PARESH M DAVE for Petitioner No. 1-2

MR ASIM J PANDYA for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 15/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Mr Asim Pandya, learned Additional

Standing Counsel for the Central Government waives service of Rule for the respondents.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. Since the Court proposes to remand the matter, only the relevant facts from this view point are set out hereinafter.

3. On 21.5.1999, a show cause notice was issued by the Additional Commissioner of Central Excise & Customs-I, Surat (respondent No.3) demanding total excise duty of Rs.10,47,527/- with the other proposals for confiscation and penalty. Respondent No.3 passed order dated 24.11.2000 confirming the said duty demand and also imposing penalty of equal amount on the petitioner-Company and the penalty of Rs.1 lakh on the second petitioner. The petitioners received a copy of the said order on 22.2.2001. On 16.4.2001, the petitioners filed two applications before the Customs & Central Excise Settlement Commission, Mumbai in respect of the above order of the Additional Commissioner. On 24.7.2001, the Settlement Commission heard the applications and thereafter by order dated 9.8.2001, the Settlement Commission refused to admit the applications on the ground that the petitioners had not filed appeals before filing the applications before the Settlement Commission. In short, the Settlement Commission took the view that since no case was pending at the time when the petitioners moved the applications before the Settlement Commission, the applications before the Settlement Commission were not maintainable. After the petitioners received the above order of the Settlement Commission dated 13.8.2001, the petitioners filed two appeals with two stay applications and two applications for condonation of delay before the Commissioner of Central Excise & Customs (Appeals), Surat - respondent No.2 herein for challenging the above Order-in-original dated 24.11.2000. The Commissioner (Appeals), however, held that the appeals were filed beyond the period of limitation i.e. beyond the period of 3 months within which the appeal was required to be filed and also beyond the further period of 3 months for which alone the Commissioner (Appeals) had the power of condonation of delay. In view of the above, the petitioners have moved this Court challenging the aforesaid order of the Commissioner (Appeals) and also in the alternative challenging the Order-in-original dated 24.11.2000.

4. Mr Paresh M Dave, learned counsel for the petitioners has relied on two decisions of the Allahabad

High Court in Eureka Forbes Ltd. vs. Union of India, 1998 (98) ELT 591 (All.), and Jai Hind Bottling Company (P) Ltd. vs. Commr. (Appeals) C. Ex., Allahabad, 2002 (146) ELT 273 (All.) in support of his contention that the provisions of Excise Act, particularly Section 35 thereof do not exclude the application of the provisions of Sections 29(2) and 5 of the Limitation Act, 1963 and, therefore, the said provisions of the Limitation Act are applicable even in a case where there is a time limit prescribed by the Special Act. The learned counsel has also relied upon the decision of the Apex Court in ITC Ltd. vs. Union of India, 1998 (101) ELT 9.

5. On the other hand, Mr Asim Pandya, learned Addl. Standing Counsel for the Central Government has supported the orders of the appellate authority as well as the Order-in-original.

6. Having heard the learned counsel for the parties, it appears to the Court that it is not necessary in the facts of the instant case to decide the question raised by Mr Dave about applicability of the provisions of Sections 29(2) and 5 of the Limitation Act, 1963 to the appeals under Section 35 of the Act for the simple reason that in the facts before the Apex Court also in the aforesaid decision in ITC Ltd. (supra), the time limit of 3 + 3 months had expired when the writ petition challenging the Order-in-original reached hearing and the question of alternative remedy was raised and the Apex Court observed in the circumstances of that case that the ends of justice will be met if the petitioner is permitted to file a belated appeal within one month from the date of order with an application for condonation of delay, whereon the appeal may be entertained.

7. Mr Asim Pandya, learned Addl. Standing Counsel has, however, submitted that since the bar of limitation is expressly contained in Section 35 of the Act, the Commissioner (Appeals) cannot condone the delay in filing the appeal and, therefore, such a direction may not be issued.

8. However, the objection raised by the learned counsel for the respondents appears to be misconceived. In the facts of the instant case, the petitioners did approach the Settlement Commission on 16.4.2001 which was within 2 months from the date of service of the Order-in-original and it was on account of pendency of the applications before the Settlement Commission for almost 4 months that when the petitioner was required to file appeals before the appellate Commissioner, the

period of limitation ran out. In the facts of the present case, it cannot be said that the petitioners were not prosecuting their applications before the Settlement Commission. In fact the petitioners had moved the Settlement Commission within two months from the date of receipt of the Order-in-original and after receiving the Settlement Commission's order dated 9.8.2001 on 13.8.2001, the petitioners preferred appeals before the appellate Commissioner on 29.8.2001. The petitioner had moved the appellate authority expeditiously, if the period taken by the Settlement Commission for deciding the petitioners' applications is excluded. If the Settlement Commission had rejected the applications at the threshold by noticing that no case was pending on the date of making applications before the Settlement Commission on 16.4.2001, there would not have been any delay.

9. Apart from the aforesaid aspect, what has weighed with us for entertaining the petition and giving the directions is the fact that the petitioners have already paid Rs.6,13,169/- (as stated on internal page 4 of the appeal memo, which is annexed to this petition) as against the duty of Rs.10,47,527/- demanded from the petitioner-Company apart from the penalty on the Company and penalty on the Directors.

10. In the aforesaid peculiar facts and circumstances, we set aside the order dated 18.7.2003 of the Commissioner of Central Excise & Customs (Appeals), Surat (Annexure "C") and direct respondent No.2-Commissioner of Central Excise & Customs (Appeals), Surat to entertain petitioners' Appeal Nos.V2(54)137 & 138/SRT-I/DIV-III/2001 and the stay applications therein in accordance with law without raising any objection about the delay in filing the appeal.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. SHAH, J.)

(A.M.KAPADIA, J.)

zgs/-